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NO. 94-1508

SUPREME COURT OF THE UNITED STATES
October Term, 1994

HOWLAND C. LUTZ,

Petitioner,

vs.

NAVISTAR INTERNATIONAL
TRANSPORTATION CORP.,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT NAVISTAR INTERNATIONAL TRANSPORTATION CORP.

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STATEMENT OF CORPORATE AFFILIATIONS

Navistar International Corporation is the parent corporation of Respondent Navistar International Transportation Corp. Respondent has no subsidiaries that are not wholly-owned.

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STATEMENT OF THE CASE

It is difficult to conceive of a case that is less deserving of Supreme Court review than the instant appeal. Petitioner claims that it raises an important legal issue concerning the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §621, et seq. But the issue purported by Petitioner -- whether summary judgment may properly be entered in favor of an employer in an ADEA action where (a) the discharged employee was replaced by a younger worker, (b) there was an increase rather than a decrease in the workforce, and (c) the employer admits that age was a determining factor in the discharge -- is not even in dispute in this case. Instead, Petitioner attacks the factual conclusions of the District Court that he was not "replaced" by a younger worker, that he was discharged in an economically-motivated reduction of the workforce, and that his employer never stated that age was a determining factor in his discharge. None of these factual matters warrants review by the United States Supreme Court.

The action. Petitioner Howland C. Lutz was employed by Respondent Navistar International Transportation Corp. in several managerial positions at Navistar plants in Springfield, Ohio. In October 1986, Navistar faced lower than expected net income, reduced shipments of its products, and a gloomy forecast of declining markets in the future. Navistar was forced to significantly reduce its operating costs, including, inter alia, reducing the workforce at its Springfield plants. Petitioner was one of 72 managers -- out of a total of 482 managerial employees -- who were released. Two years later, Petitioner filed this lawsuit in the United States District Court for the Southern District of Ohio, Western Division, alleging that his employment had been terminated by Navistar because of his age, in violation of the ADEA. (Complaint, Oct. 12, 1988.)

The proceedings below. After 2½ years of discovery proceedings in the trial court, Navistar moved for summary judgment on the grounds that Petitioner's discharge had been based solely on economic considerations, and that his

age had not been a determining factor. (Motion for Summary Judgment, Feb. 20, 1990.) The District Court granted the motion. (Decision and Entry, Dec. 31, 1992.) It reasoned that Petitioner's conclusory allegations of age discrimination, supported only by his own subjective beliefs, were insufficient to sustain his claims in the face of undisputed evidence that his discharge resulted from an economically-motivated reduction in the workforce, and that the workforce reduction had actually increased the percentage of older Navistar managers in the statutory protected age class. (Id., at 2, 4.) That decision was affirmed per curiam by the United States Court of Appeals for the Sixth Circuit. (Order, Dec. 12, 1994.)

The evidence. Petitioner presented evidence in the District Court that he was over the age of 40, and thus in the age class protected by the ADEA, at the time of his discharge; that he was reasonably qualified for his managerial employment position; and that he was discharged from that position by Navistar. He now claims that he also presented evidence of the fourth element of an ADEA prima facie case:

that he was replaced by a younger employee. (Petition, at 22.) There is no such evidence. It was undisputed below that the "replacement," Marshall D. Leigh -- a Navistar manager who was himself in the protected age class -- was briefly and temporarily transferred to Petitioner's former department to maintain production requirements for a six week period during the implementation of the reduction in the workforce, and that he was then transferred elsewhere, leaving that department with two fewer managers than it had before the reduction. Thus, Petitioner was not replaced by anyone, as a matter of undisputed fact.

In addition, Petitioner attempts to dispute Navistar's non-discriminatory explanation for his discharge -- a general reduction in workforce mandated by economic necessity -- by now claiming that there was actually an increase in the workforce; according to Petitioner, the number of managers in his former department increased by two in the following year, and increased further in a later year. (Petition, at 6.) But Petitioner bases his count upon a list of every supervisor who

worked in the department for any length of time during that period and not upon the number of managerial positions in that department. (Exhibit E, Navistar's Response to Plaintiff's First Request for Production of Documents.) It remains undisputed that a reduction in the workforce occurred, from 482 down to 410 managers generally, and that Petitioner's department functioned with two fewer managerial positions until, long after his discharge, a second shift was temporarily required on one production line to meet marketplace exigencies. In short, Petitioner was discharged as part of reduction in workforce, as a matter of undisputed fact.

Third, and finally, Petitioner insists that Navistar has "admitted" that age was an adverse determining factor in his discharge. (Petition, at 5, 22, 27.) Both the District Court and the Circuit Court found that Navistar made no such "admission." Instead, Navistar's Manager of Human Resources, Thomas Hennigan, testified at deposition that he instructed the individuals who made the discharge decisions "to give consideration to EEO, age, company service, performance,

flexibility, education, training, background, experience." (Dep. of T. Hennigan, Feb. 12, 1990, at 22.) Even though "age" thus appears in a list of factors that clearly favor the retention of older more experienced workers, Petitioner chose to interpret Mr. Hennigan's statement as favoring the retention of younger workers. Any perceived ambiguity in this respect ended when Navistar filed Mr. Hennigan's affidavit:

> In that deposition, Mr. Rush [counsel for Plaintiff] asked me the factors which were involved in the plan for separation of management employees in October 1986 .... My reference to "EEO" and "age" as factors which managers should consider was made solely with the intent of instructing managers that the separations must be conducted in strict accordance with the Equal Employment Opportunity and Age Discrimination Law .... Mr. Rush asked me nothing further concerning my response to his question, and I truly believed at that time that those attending the deposition understood the meaning of my response.

(Supp. Aff. of T. Hennigan, March 27, 1990, attached to Navistar's Reply Mem. in Support of Summary Judgment, at 1-2.)

More importantly, the Navistar employees who carried out the reduction in workforce clearly understood exactly what Mr. Hennigan was telling them -- the percentage of managers in the protected older age class actually increased as a result of the October 1986 workforce reduction (Aff. of T. Hennigan, Feb. 20, 1990, attached as Exhibit A to Navistar's Motion for Summary Judgment, at 4), i.e., there was, as a matter of undisputed fact, no discrimination against older workers in the workforce reduction.

The District Court concluded that Mr. Hennigan's reference to "age" was not an "admission" that age was an adverse determining factor in Petitioner's discharge:

> In this case, the only evidence, direct or circumstantial, that could conceivably demonstrate pretext ... is the above-quoted language from Hennigan's deposition. As indicated, that somewhat ambiguous statement was clarified (not contradicted) by Hennigan .... [I]t is neither a reasonable inference nor a remote possibility that any reasonable/rational trier of fact could conclude that Hennigan's deposition meant, as Plaintiff would have this Court believe, that he directed his managers ... to make certain that age was a determining [adverse] factor .... [I]n the very same

> sentence, Hennigan has stated that he directed his managers to also take into consideration ... EEO considerations. [Plaintiff's interpretation] would have Hennigan telling his managers to be very cognizant of EEO considerations but to fire the old people anyway. Such an interpretation would be not only unreasonable and irrational, but ridiculous as well.

(Decision and Entry, Dec. 31, 1992, at 5-6.)

In summary, the dispute between the parties involves the evidentiary existence of the three factual predicates to Petitioner's "issue of law," and not the "issue of law" itself. As set forth below, those factual matters were resolved properly by the District Court. This case does not raise any legal question arising under the ADEA and does not warrant review by the United States Supreme Court.

ARGUMENT

In the absence of any controlling question of law, the Supreme Court should decline to second-guess a District Court's determinations of factual matters.

Petitioner's request for a writ of certiorari should be denied. This litigation does not present any significant issues of law, policy, or fairness, and there is no conflict between any lower courts as to the factual matters decided by the District Court. The ruling below does not conflict with any decision of this Court and does not implicate any important issues of federal law which require review by the Court. Petitioner has utterly failed to suggest any reason to grant certiorari in this case.

Petitioner disingenuously claims that a writ should issue in this matter so that the Court can "review and resolve the division among the Circuits" regarding the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621, et seq. This is apparently a reference to the somewhat different approaches employed by some federal courts in evaluating a

prima facie case pursuant to the four factors outlined in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). Whatever academic interest that legal question might have for the Court, it is not an issue in this case. The District Court correctly concluded that the fourth factor of the McDonnell-Douglas standard -- the replacement of Petitioner by a younger worker -- did not occur here as a matter of fact. Any purported need to resolve the "conflict among the Circuits" on a different issue must await a case that factually raises the issue. This is not such a case.

If a plaintiff in an ADEA case only establishes the first three factors of McDonnell-Douglas -- that he is in the protected age class, that he was qualified for his employment position, and that he was discharged -- a court cannot logically or legally infer that age was a determining factor in the discharge. Indeed, the first three factors exist in any discharge that occurs during a non-discriminatory reduction in workforce. The fourth factor -- that plaintiff was replaced by a younger worker -- is critical because it is the only factor that even

suggests the existence of age discrimination, as required by the ADEA. See 29 U.S.C. §623(a) ("it shall be unlawful for an employer ... to discharge any individual ... because of such individual's age") (emphasis added).

In the present case, Petitioner's only "proof" of the critical fourth factor is the undisputed evidence that, after he was discharged, another manager was temporarily assigned to cover his former position for a six week period in order to solve temporary production problems; that person was transferred to a different position in a different department within a very short time, and Navistar then operated Petitioner's former department without anyone filling his former position. (Aff. of T. Hennigan, supra.) The District Court correctly concluded that Petitioner was not "replaced" by a younger worker. See, e.g., Barnes v. GenCorp, Inc., 896 F.2d 1457, 1465 (6th Cir. 1990) ("a person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees").

Having failed to establish a prima facie case of age discrimination, Petitioner then further failed to demonstrate that Navistar's non-discriminatory explanation of his discharge -- a general reduction in workforce mandated by economic considerations -- was pretextual. First, there is nothing in the evidentiary record that supports his claim that the workforce actually increased, rather than decreased, at the time he was discharged. His present claim -- that the number of managers in his former department increased the following year -- is based upon a count of all persons who served in a managerial position for any part of the year, not upon a count of managerial positions. (See Exhibit C of Navistar's Response to Plaintiff's First Request for Production of Documents.) Petitioner's further argument that the number of managerial positions increased two years later, in 1988, does not logically show that there was no reduction of the workforce at the time he was discharged, in 1986; in any event, it is undisputed that this later increase was temporary, that it resulted from the short-term addition of a second shift to meet production exigencies, and

that the managers placed in those positions were not new hires but were in fact reassigned from existing positions. Once again, none of this remotely establishes that there was no workforce reduction when Petitioner was discharged, and thus cannot support any inference that the workforce reduction was pretextual.

More importantly, Petitioner cannot claim that the reduction in workforce was a pretextual device to disguise discrimination against older workers, because the undisputed evidence conclusively shows that the proportion of older managers actually increased as a result of the workforce reduction. After Petitioner and the other 71 managers were discharged, a higher percentage of managers fell within the statutory protected age class. (Aff. of T. Hennigan, supra.) In short, Petitioner cannot possibly establish that the workforce reduction was a pretextual ploy to reduce the number of older workers, when the reduction disproportionately impacted upon younger workers.

This statistical evidence of an increase in the percentage of older managers, as a result of the workforce reduction, also logically precludes Petitioner's final claim: that Navistar has admitted that age was an adverse determining factor in selecting which managers it would discharge. That claim cannot possibly be true, because it is undisputed that younger managers were in fact discharged at a proportionately higher rate than older managers, and age was thus a factor favoring retention rather than discharge.

In any event, Navistar never made the "admission" claimed by Petitioner. Its Manager of Human Resources, Thomas Hennigan, testified at deposition that "as far as guidance to the managers who were making the [discharge] decision, the individuals were counseled to give consideration to EEO, age, company service, performance, flexibility, education, training, background, experience." (Dep. of T. Hennigan, supra, at 22.) Where "age" is one factor in a list that begins with a reference to non-discrimination requirements, and concludes with a list of factors that favor older workers, it is

ridiculous for Petitioner to assume that "age" alone was an adverse factor. The statistical outcome of the application of these considerations demonstrates that fewer older workers were discharged, i.e., that "age" was not an adverse determining factor. The most that Petitioner can claim is that Hennigan never specified if the considerations he listed were adverse to or supportive of, retention, and that his statement is therefore ambiguous. Any perceived ambiguity was clarified in his affidavit: "My reference to 'EEO' and 'age' as factors which managers should consider was made solely with the intent of instructing managers that the separations must be conducted in strict accordance with the Equal Employment Opportunity and Age Discrimination Laws." (Supp. Aff. of T. Hennigan, supra.)

The District Court specifically held that Mr. Hennigan's affidavit "does not contradict his deposition testimony; it explains or amplifies upon the answers he gave ...." (Decision and Entry, Sept. 30, 1993, at 2.) Petitioner's present argument -- that the affidavit should not have been admitted because it contradicted the deposition testimony -- once again

fails to raise a legal issue deserving of review by this Court; instead, he disagrees with the factual determination of the District Court that there was no contradiction. It is beyond cavil that, in the absence of any contradiction, the affidavit was properly considered by the District Court. See, e.g., Martin v. Merrell Dow Pharmaceuticals, Inc., 851 F.2d 703 (3d Cir. 1988); Dilberti v. United States, 817 F.2d 1259 (7th Cir. 1987); Lane v. Celotex Corp., 782 F.2d 1526 (11th Cir. 1986).

In short, the "legal issue" identified in this case by Petitioner -- whether it is error to grant summary judgment to an employer in an ADEA case if (1) the employee was replaced by a younger worker, (2) there was no decrease in the workforce that explains his discharge, and (3) the employer admits that age was an adverse determining factor in the discharge -- is not even in dispute in this case. Instead, Petitioner complains that the District Court improperly concluded that the three factual predicates of his legal issue were not supported by the evidence. None of these factual issues warrants review by the United States Supreme Court.

See St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2751 (1993) ("[w]e have no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate factfinder determines, according to proper procedures, that the employer has unlawfully discriminated") (original emphasis).

CONCLUSION

Petitioner's request for a writ of certiorari should be denied. There is no dispute as to the legal principles governing this litigation, and there is no reason for the Supreme Court to second-guess the factual conclusions of the District Court and Circuit Court of Appeals. Petitioner's claim of age discrimination in the 1986 reduction of Respondent's workforce cannot possibly succeed in the face of the undisputed fact that the reduction disproportionately affected younger workers. Petitioner's speculative and subjective belief that he must have been the victim of age discrimination cannot prevail over the evidence of record that no such discrimination occurred. There is no conceivable reason for the Supreme Court to expend its

time and resources to revisit the factual conclusions of the courts below. The petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the foregoing Brief in Opposition were served upon all other parties in this action:

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via regular U.S. Mail, postage prepaid, this 12th day of April, 1995.

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